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No. 85-1329 and 85-6207

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

GERALD J. YOUNG, GEORGE CARISTE, SOL N. KLAYMINC, NATHAN HELFAND, *Petitioners*,

v.

UNITED STATES, EX REL. VUITTON ET FILS S.A., et al., *Respondent*.

BARRY DEAN KLAYMINC, *Petitioner*,

v.

UNITED STATES, EX REL. VUITTON ET FILS S.A., et al., *Respondent*.

On Writs Of Certiorari To The United States Court Of Appeals For The Second Circuit

REPLY BRIEF FOR PETITIONERS

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In this Reply Brief, petitioners will respond to the contention that due process was not violated by the appointment of an interested private attorney to investigate and prosecute a serious criminal contempt and will discuss the applicable standard for review.[1]

ARGUMENT

I. RESPONDENT HAS INCORRECTLY BALANCED THE DUE PROCESS CRITERIA SET FORTH IN *MATHEWS* V. *ELDRIDGE*.

Three interests must be balanced in order to decide what process is due in a given situation: the private interest of the individual involved; the risk that the procedures used will lead to an erroneous deprivation of rights and the likely value of other procedural safeguards; and the Government's interest. *Mathews* v. *Eldridge*, 424 U.S. 319, 334-335 (1976). Analysis of these three factors compels the conclusion that the appointment of the interested special prosecutor violated the due process rights of the defendants.

In this case, the first *Mathews* factor is personal liberty. Due process requires greater safeguards where the interest at stake is recognized by law to be of high value. The individual's interest in personal liberty is perhaps the most important in our society. *Lassiter* v. *Department of Social Services*, 452 U.S. 18, 25-27 (1981).

An examination of the second *Mathews* factor, the risk of an erroneous deprivation of this right, also strongly

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[1] In Point II of Respondent's Brief and in their reformulated second Question Presented, respondent claims that petitioner and the United States as *amicus curiae* ask this Court to amend Rule 42(b) without following the statutory procedure for such amendment. 18 U.S.C. § 3771. This is simply untrue. Neither the terms of Rule 42(b) nor the Advisory Committee's notes addresses the issues presented by this case.

supports petitioners. Where an interested prosecutor with no training, supervision or accountability conducts an investigation (particularly a sting) and prosecution, the risk of an unreliable result is especially high. The exercise of broad prosecutorial discretion by the interested private attorney causes private interests to infect the normal policy-making and implementation function of the public prosecutor. When these influences are combined with the exercise of deception and misrepresentation inherent in a sting operation, the resulting improper manipulation raises the distinct possibility that initial targeting and the failure to offer opportunities to dispose of the case prior to trial were all motivated by private interests and not the public's. In this case, the long history of animosity between Bainton, Vuitton and the defendants increased the risk that the result would not be fair.

In order to avoid injection of private interest into the criminal justice system and the impermissible risk that entails, the United States Government recommends in its *amicus* brief that serious out-of-court contempts first be referred to the United States Attorney's Office. Under no circumstances would an interested attorney be permitted. These procedures offer an additional safeguard which would greatly reduce the risk of an improper deprivation of liberty.

The third *Mathews* factor to be considered is the interests of the government. The government has a strong interest in prosecuting individuals who have violated court orders. 18 U.S.C. § 401(3). But, the government has no interest in having the prosecution conducted by one who labors under a conflict of interest.[2] *Cf.* 18 U.S.C.

[2] Respondent claims that Vuitton "express[ly] subordinat[ed] . . . its interests to those of the United States. . . ." Brief for Respondents at 22 (Resp. Br.). Unfortunately, no portion of the record is referenced, nor can one be, since nothing in the record will support this claim.

§ 208.

Only two reasons have been offered in support of interested special prosecutors. First, it is said that the interested party's access to information justifies that person's appointment. *McCann* v. *New York Stock Exchange*, 80 F.2d 211 (2d Cir. 1935). However, this reasoning ignores the fact that public prosecutors commonly obtain information from others to conduct prosecutions—often in extremely complicated matters. There is no reason that this cannot occur in cases of seious criminal contempt. The second reason, which prompted the Second Circuit decision permitting this practice, *Musidor, B.V.* v. *Great American Screen*, 658 F.2d 60 (2d Cir. 1981), cert. denied, 455 U.S. 944 (1982), is the "practicalities of the situation." The *Musidor* court emphasized its concern that "[t]here is no fund out of which to pay other counsel. . . ." *Musidor*, 658 F.2d at 65. Respondent continues to rely on this rationale. Resp. Br. at 3, 17, 23. This claim has been more than adequately answered by the Administrative Office of the United States Courts which has said that it has a "fund out of which to pay other counsel." Indeed, this fund has been drawn upon by disinterested special prosecutors appointed pursuant to Rule 42(b). *See* Brief for the United States as Amicus Curiae (Amicus Br.) and Letter from Administrative Office of the United States Courts, dated October 2, 1986, lodged at L-56.[3]

[3] Respondent also claims that $75 per hour, the amount available through the Administrative Office of the United States Courts, will deter disinterested attorneys from accepting assignments. It is ironic to suggest that $75 per hour is not enough since it is on par with other statutorily-created appointments held by lawyers. See 18 U.S.C.

Given that all three *Mathews* factors point to the need for a disinterested special prosecutor, the use of an interested special prosecutor here violates defendant's due process rights.

II. THE RULE OF AUTOMATIC REVERSAL SHOULD APPLY WHERE AN INTERESTED PRIVATE PARTY IS APPOINTED TO PROSECUTE A SERIOUS CRIMINAL CONTEMPT.

The Solicitor General of the United States agrees with petitioners' position that it was error for the District Court to authorize an interested private lawyer to investigate and prosecute this case. The *amicus* brief raises the further question of what standard this Court should apply in reviewing the error. *Amicus* Br. at 29. The appropriate standard to be applied is that such an error requires reversal without a showing of actual prejudice. This same standard, derived from the Court's harmless error jurisprudence, would apply whether this Court bases its finding of error on Constitutional grounds, or, instead, on its supervisory powers.[4]

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§ 3006A (attorneys compensated at a rate not to exceed $60 for in court time and $40 for out of court time). It cannot be seriously argued that attorneys filling these positions do not perform adequately due to the low rate of compensation in comparison to the rates paid by this country's large law firms. Respondent further argues that sting investigations are very expensive and that the expense will inhibit their use by a disinterested prosecutor. Resp. Br. 22-26. Given the higher level of expertise and training required to conduct a sting investigation and the increased risks to the defendant, it is desirable that even disinterested special prosecutors refrain from undertaking sting operations.

[4] As articulated in the Government's brief, this Court's supervisory power provides an adequate ground on which to invalidate the procedure used here. *See generally Amicus* Br.

Courts have consistently refused to sustain convictions in cases where the effect of an error is very difficult to ascertain or is unknowable. Most commonly, these are cases in which the universe of information on review is incomplete, especially where the error is not a part of the record. *Rose* v. *Clark*, 54 U.S.L.W. 5023, 5026 n. 7 (1986). Courts have also refused to sustain convictions, without regard to the strength of evidence against a defendant, in cases where the error offends fundamental values in our system of justice. *Vasquez* v. *Hillery*, 54 U.S.L.W. 4068 (1986). The error in the petitioners' case requires reversal on each of these two grounds.

In *Rose* v. *Clark*, *supra*, this Court applied harmless error analysis to a malice instruction which violated the rule of *Sandstrom* v. *Montana*, 442 U.S. 510 (1979). The decision was based on the joint proposition that the trial record was complete and that it could have established guilt beyond a reasonable doubt.[5] The Court emphasized that the error "did not affect the composition of the record" and thus did "not require any difficult inquires concerning matters which might have been, but were not placed in evidence." *Rose* v. *Clark*, *supra*, at n. 7. See also *Rushen* v. *Spain*, 464 U.S. 114 (1983), *reh'g denied*, 465 U.S. 1055 (1984); *U.S.* v. *Lane*, 54 U.S.L.W. 4123 (1986). The rationale for refusing to adopt a *per se* rule requiring reversal in *Rose*, *Rushen* and *Lane* was that the universe of relevant information was closed. In such cases a court can be confident of its ability to evaluate the impact of the error in view of the complete record, and thereby to determine whether the result was reliable.

In *Vasquez* v. *Hillery*, *supra*, five Justices held that racial discrimination which affected the composition of the

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[5] The case was remanded for application of the harmless-error test.

indicting grand jury required automatic reversal of the resulting conviction.[6] Their rationale was that it is impossible to measure the impact of impermissible discrimination on the grand jury's exercise of discretion. The majority agreed that even ultimate conviction on the indicted offense does not suggest at all

> that the discrimination did not impermissibly infect the framing of the indictment and, consequently, the nature of or very existence of the proceedings to come . . . Once having found discrimination in the selection of a grand jury, we simply cannot know that the need to indict would have been assessed in the same way by a grand jury properly constituted.

Id. at 4071. The grand jury's discretion to indict for a more or less serious offense, if at all, is similar to the prosecutor's even more expansive discretion. Even accepting, *arguendo*, the objection implicit in the dissent that there was no doubt that any grand jury would have exercised its discretion in favor of indicting the defendant for murder, the principle emerges unscathed: where the universe of information is not complete, courts cannot apply harmless error analysis.

In *Holloway* v. *Arkansas*, 435 U.S. 475 (1978), this Court held that when a trial court improperly required joint representation of co-defendants, automatic reversal

[6] In footnote 30 of petitioners' brief (Pet. Br. at 24), petitioners incorrectly claimed that this Court had not ruled on a criminal contempt defendant's right to indictment by grand jury. In fact, in *Green* v. *U.S.*, 356 U.S. 165 (1958), this Court held that criminal contempt defendants had neither the right to indictment by grand jury, nor the right to trial by petit jury. In *Bloom* v. *Illinois*, 391 U.S. 194 (1968), this Court established a right to a jury trial in serious criminal contempts, thus overruling that portion of *Green*. The Court has not since re-examined the right of a defendant in a serious criminal contempt to be indicted by a grand jury.

was required because the defense attorney was laboring under a conflict of interest. The Court enumerated multiple instances where a lawyer's discretion might be infected by the constraints and motivations of concurrent representation of two clients:

> For example, in this case it may well have precluded defense counsel for Campbell from exploring possible plea negotiations . . . [A] conflict may also prevent an attorney from challenging the admission of evidence prejudicial to one client but perhaps favorable to another, or from arguing at the sentencing hearing the relative involvement and culpability of his clients in order to minimize the culpability of one by emphasizing that of another. Examples can be readily multiplied.

Id. at 489-90. This Court emphatically rejected any requirment that the injured defendant show prejudice because it "would not be susceptible of intelligent, even-handed application." The Court distinguished trial error, the scope of which it deemed commonly measurable on review, from the harm of joint representation.

> [T]o assess the impact of a conflict of interests on the attorney's options, tactics, and decisions . . . would be virtually impossible. Thus, an inquiry into a claim of harmless error here would require . . . unguided speculation.

Id. at 490-91. The same problem of immeasurability applies with equal or greater force to the work of the prosecutor, who has vast discretionary power.[7] *See also*

[7] In recognition of the seriousness of the problem and the impossibility of measuring the impact of competing interests, Congress sought to discourage them by prescribing felony penalties for government officers or employees in the executive branch who participate in matters in which they have financial interests. 18 U.S.C. § 208(a). In this case, Bainton's conflict of interest was, among other things, financial, in that both he and his client Vuitton stood to benefit financially from convictions in the criminal contempt actions.

Payne v. *Arkansas*, 356 U.S. 560 (1958) (regardless of independent evidence supporting a conviction, it is impossible to assess from a general verdict what weight the jury might have given to a coerced confession improperly admitted into evidence).

The cases demonstrate that error which is outside a closed record, gives reviewing courts the impossible task of speculating retrospectively about what might have been in people's minds. Attempting such inquiries would be unlikely to yield useful information, and it would invite increased litigation. In this case, it is impossible to identify the multiple instances when Bainton exercised discretion. He chose whom to investigate and how. He decided how to manipulate the various players, using the power of his "office" to extend immunity and to authorize and structure deals in exchange for cooperation. This exercise of unbridled discretion both created and infected the record for review.

Obviously, this Court had concerns beyond the incomplete records in *Vasquez*, *Holloway* and *Payne*. The errors in those cases threatened values fundamental to the criminal justice system, worthy of protection in their own right, even though they are unrelated or only partially related to the truth-seeking function of the trial. In *Vasquez*, four Justices agreed that "racial discrimination in the selection of grand juries is intolerable even if the defendant's guilt is subsequently established in a fair trial." *Rose* v. *Clark*, *supra*, at 5028 (concurrence by STEVENS, J., citing *Vasquez* v. *Hillery*, supra). *See also Allen* v. *Hardy*, 54 U.S.L.W. 3856 (1986) [rule of *Batson* v. *Kentucky*, 54 U.S.L.W. 4425 (1986), prohibiting racial discrimination in selection of petit jury serves values besides truthfinding function of criminal trial: it promotes public confidence in administration of justice].

By the same token, the error here—allowing an interested private attorney untrammelled discretion and vast unsupervised[8] authority in the investigation and prosecution of a serious criminal contempt—should be exempted from harmless error analysis. The right to be prosecuted by a publicly accountable official, free of private motives, protects an independent value. Beyond its impact on any given defendant, employing an interested prosecutor undermines society's confidence in the justice system. It is essential for citizens in a free society to be secure that the awesome machinery of the government will not be invoked against them except according to uniform and knowable standards. Prosecution by an interested private party violates that trust between individual and state. A conviction stemming from it should not be permitted to stand.

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[8] The record reveals that nominal involvement by the District Court in this case did not amount to any substantive supervision of the sting operation. Judges, as a practical and institutional matter, are not properly situated to supervise complex investigations or prosecutions. Furthermore, their participation, to the extent that it is possible and sanctioned, raises corresponding separation of powers concerns.

CONCLUSION

The decision of the Second Circuit should be reversed and the Order to Show Cause dismissed.

Respectfully submitted,

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